90-151

In the Supreme Court of the United States

OCTOBER TERM 1990

No. _____

SUN BELT FEDERAL BANK, F.S.B.
Respondent
v.
RIVER VILLA PARTNERSHIP, ET AL.
Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 20, 1990

QUESTIONS PRESENTED

1. Did the Fifth Circuit Court of Appeals err in refusing to remand a case that clearly qualifies for such a remand under this Court's decision in *Coit Independence Joint Venture v. FSLIC,* _____ U.S. _____, 109 S.Ct. 1361 (1989), by refusing to even refer to the issue, thus violating the Petitioner's rights under Article III of the United States Constitution?

2. Did the Fifth Circuit Court of Appeals, in affirming a summary judgment in favor of FSLIC so as to sanction the district court's prohibition of evidence of fraud where the issue was whether the principals ratified the notes and mortgage on which the judgment was based, and which notes and mortgage admittedly exceeded the authority of the powers of attorney that authorized them, properly apply *D'Oench, Duhme, & Co., v. FDIC,* 318 U.S. 447 (1942), and *Langley v. FDIC,* 484 U.S. 86 (1987)?

[Note: Petitioners reserve the right to argue Questions 3 and 4 in the event certiorari is granted on both of the above questions, but does not include Questions 3 and 4 among the reasons for the grant of certiorari].

3. Did the Fifth Circuit Court of Appeals, in affirming the summary judgment, properly reject this Court's interpretation of the application of the Federal Deposit Insurance Act of 1950, § 2(13)(e), 64 Stat. 889, as amended, 12 U.S.C. § 1823(e), as set out in *Langley v. FDIC,* 484 U.S. 86 (1987), as to when FSLIC becomes bound by the documents contained in the files of a supervised savings and loan institution?

4. Did the Fifth Circuit in its decision properly apply this Court's decision in *Torres v. Oakland Scaveger Co.,* 486 U.S. 312 (1988), to the individual partners in a Louisiana partnership?

LIST OF PARTIES

Since all of the original defendants are not parties to this application, the original parties shall be hereinafter referred to corporately as "defendants", or "River Villa", while those joining in this application will be referred to as "petitioners." The original defendants included River Villa Partnership, a general partnership organized under the laws of Louisiana, as well as all of the named partners therein. The present application includes the partnership and the named remaining partners.

Those joining in this application as petitioners are:
River Villa Partnership
Patrick Breaux
L.O. Broussard
Francis Elias
William Harkrider
Thomas Jenkins, Jr.

W. Simmons Sandoz as Trustee for Leon Lastrapes, III, in that matter entitled "In Re: Leon Lastrapes, III, Debtor, Case No. 89BK-50958 in the U.S. Bankruptcy Court, Western District of Louisiana."

Billy R. Vining as Trustee for Robert Lyon, in that matter entitled "In Re: Robert Lyon, Debtor, Case No. 90-11453 in the U.S. Bankruptcy Court, Western District of Louisiana."

W. Simmons Sandoz as Trustee for Henry McLemore, II, in that matter entitled "In Re: Henry Ervin McLemore, II and Mary Angeline Williams McLemore, Debtors, Case No. 90-BK-50474 in the U.S. Bankruptcy Court, Western District of Louisiana."

Gerald Murdock
William O'Neill
Gerald H. Schiff
Charles F. Smith
Lawrence Tujague

The respondent is the Federal Savings and Loan Insurance Corporation, as Receiver of Sun Belt Federal Bank, F.S.B.

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IN THE SUPREME COURT OF THE UNITED STATES
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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 898 F.2d 996, and is reprinted in the appendix hereto, p. A-1, *infra*.

The opinion of the United States District Court for the Middle District of Louisiana is reported at 687 F. Supp. 1038, and is reprinted in the appendix hereto, p. A-13, *infra*.

JURISDICTION

This is a FSLIC foreclosure case. After the filing of the receivership, and subsequent transfer to federal district court, cross motions for summary judgment were filed, first by defendants and then by FSLIC. The district court granted FSLIC's motion, and denied defendants' motion on June 25, 1988 with the final judgment being signed on December 15, 1988 and is reported at 687 F. Supp. 1038. The judgment was appealed to the Fifth Circuit Court of Appeals, and after final judgment in that Court affirming the district court on

April 6, 1990 which is reported at 898 F.2d 996, a petition for rehearing was timely filed on April 9, 1990. The application for rehearing was denied on April 25, 1990.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

12 U.S.C. § 1823(e). Agreements against interests of Corporation. No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

STATEMENT OF THE CASE

This is a FSLIC foreclosure case.[1] It originated prior to FSLIC's imposing receivership on Sun Belt Federal Bank,

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[1] As a result of changes in federal law, under the Financial Institutions Reform and Recovery Act of 1989 ("FIRREA"), the Federal Deposit Insurance Corporation ("FDIC") now controls many of those aspects of the regulation of thrift institutions that were previously controlled by FSLIC. The instant case was instituted prior to FIRREA's enactment.

F.S.B., in a Louisiana state court action on a $1,900,000.00 collateral mortgage and mortgage note, securing a $1,585,000.00 note.[2] After the filing of the receivership, and subsequent transfer to federal district court, cross motions for summary judgment were filed, first by defendants and then by FSLIC. The district court granted FSLIC's motion, and denied defendant's motion. The judgment was appealed to the Fifth Circuit Court of Appeals, and after final judgment in that Court affirming the district court, certiorari is sought here.

A. APPLICABILITY OF COIT:

The initial issue is the applicability of *Coit Independence Joint Venture v. FSLIC*, _____ U.S. _____, 109 S.Ct. 1361 (1989). A reading of the appellate court's decision will reveal that that issue was deliberately omitted from review. It is undisputed that a counterclaim presently exists before the district court, which was filed as a direct result of the administrative appeal before the Federal Home Loan Bank Board ("FHLBB"), pursuant to the Fifth Circuit's decision in *North Mississippi Savings and Loan Assn'n v. Hudspeth*, 756 F.2d 1096 (1985). This counterclaim was filed while the appeal to the Fifth Circuit was pending, but after, and as a direct result of this Court's decision in *Coit*.

Once *Coit* was rendered, with the Fifth Circuit's approval, petitioners filed the entire voluminous record that had been developed in the FHLBB appeal into the appellate record. This inclusion was permitted over the vigorous objection of counsel for FSLIC. Petitioners also filed a motion under Fed. R. Civ. Proc. 60(b)(6), and motions to stay execution, in both the district court and before the appellate court, based on *Coit*. These motions were denied.

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[2] The "collateral mortgage" is a security device unique to Louisiana, and which secures a mortgage note pledged as collateral security for a debt.

Petitioners had previously obtained a stay of execution of the district court's judgment from the FHLBB, pending its review of the claims before it. After *Coit* was rendered, petitioners sought to take advantage of the ruling and seek district court jurisdiction. A motion under Rule 60(b)(6) containing a copy of the *Coit* decision was immediately filed in the district court. That court refused to consider the motion or assign it for hearing choosing to await the outcome of the pending appeal. (App. A-21). Petitioners then filed a supplemental compulsory counterclaim and direct action for damages, which was also put on hold by the district court until completion of the appeal. (App. A-22). Under its new rules, the appeal before the FHLBB was automatically dismissed if the claim was filed in district court.

Several other strong issues were also appealed, and are to some extent discussed later, all of which the Fifth Circuit addressed. The remand of the matter to the district court, under *Coit*, was clearly one of the major issues presented on appeal, and, on application for rehearing, was the main issue the Fifth Circuit was asked to act upon, again citing the mandate of *Coit*. The Court of Appeals simply ignored the issue.

What the Fifth Circuit did address in its opinion was an earlier counterclaim, filed after the administrative appeal had been perfected. That counterclaim came after the partial completion of sufficient discovery, and was filed, in part, to toll the running of the statute of limitations on the issues being raised before the FHLBB. Defendants had no idea when they would ever get their counterclaim off the "administrative track", and into the district court. As noted in the opinion of the Court of Appeals, the lower court refused that claim as not being timely filed. The district court also stated that filing the counterclaim violated *Hudspeth*,[3]

[3] Here, the Fifth Circuit only addressed the issue of lateness and ignored any reference to *Hudspeth*.

which in fact it did.

The point is that two separate counterclaims were filed. The first was dismissed soon after the appeal had been accepted by the FHLBB. The other was filed after *Coit* was rendered, while the appeal record was being completed with the Court of Appeal. (Pending counterclaim, App. A-22).

It is petitioners' position that the existence of either one of these claims is sufficient for a trial *de novo* under *Coit*, and thus qualifies for an immediate remand. In *Hudspeth*, the Fifth Circuit held that all claims lodged against FSLIC had to be administratively reviewed by the FHLBB before the federal district court could maintain jurisdiction, yet here, even after *Coit*, the Fifth Circuit has given absolutely no credence to the fact that this procedure was religiously followed by defendants, completely ignoring the question in its opinion.

B. APPLICATION OF THE DOCTRINE IN *D'OENCH, DUHME* AND *LANGLEY* TO EVIDENCE DEALING WITH THE QUESTION OF RATIFICATION

The facts herein are unrefuted as to one central point: the powers of attorney on which the mortgage and notes were created were not followed. (Lower court's opinion, App. A-13.) In addition to this, the district court found "there is evidence in the record which strongly suggests the appearance of fraud" by the person who was named as agent in the said powers, Paul J. Landry. (App., A-15.) This fraud dealt with inducement by Landry in obtaining powers of attorney authorizing him to execute notes and mortgages creating the debt. Landry was the securities agent who, two years before this transaction, had formed the River Villa partnership, and sold the various interest to the unfortunate investors, including petitioners. The instant transaction dealt with an exchange of some of the properties originally

purchased when the partnership was formed, with what Landry described to the partners as a superior investment in townhouse/condominiums in Gonzales, Louisiana.

Defendants' initial motion for summary judgment was based solely on these defects and fraud. No counterclaim was then considered necessary. It is petitioners' position that their motion for summary judgment should have routinely been granted.

The basic problem now facing petitioners is that both the district court and the Court of Appeals misapplied the "estoppel doctrine" of *D'Oench, Duhme & Co. v. FDIC*, 318 U.S. 447 (1942), and its progeny to this case, even though there are no "secret" or "side" agreements directly involving the participation of defendants. Defendants were not a party to any "secret" or "side" agreements with anyone in the case. In reality, the courts below never should have addressed the estoppel doctrine because the defective and fraudulently obtained powers of attorney, ratified by the agent himself, would have to have first given rise to a *valid* obligation.

After discovering the defects on the face of the notes and mortgage, defendants' legal counsel in this action had not considered the possibility or necessity of filing any claims against Sun Belt Federal personnel or agents, and had filed their said motion for summary judgment to have the entire matter dismissed on that basis alone. This was done in January 1988. As pointed out above, the district court expressly recognized the defects in the powers of attorney. In fact, the defects were remarkably substantial.[4]

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[4] These were actually admitted by FSLIC, in an action filed against the closing attorney *(Federal Savings and Loan Insurance Corporation, Receiver of Sun Belt Federal Bank, F.S.B. vs. XYZ Insurance Company, McCollister, McCleary, Fazio, and Holliday, a Law Partnership, and Sidney D. Fazio,* Case No. 86-394-A, Middle District of Louisiana) wherein FSLIC alleged:

a. "there were defects in the authority of the person executing the note

A month after the filing of this first motion for summary judgment, in February 1988, a newspaper article appeared, announcing criminal actions filed against Sun Belt president, Larry Tullos, and its senior legal counsel, Sidney Fazio, as well as a major customer of that bank, Michael Blanton. While not charged, the broker who also had handled the real estate exchange which resulted in the subject mortgage and notes, was also the broker and party in the criminal action, Seaborn "Steve" Wicker. Wicker has recently been convicted in another FSLIC-related criminal action in federal district court in New Orleans, that involved one of the lending institutions which held a first mortgage on some of the properties River Villa received in the instant exchange. In fact, all of the convicted parties had participated in the closing of the exchange with defendants.

These criminal charges did not have any direct bearing on

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and mortgage allegedly on behalf of River Villa, as executed by the individual partners, to execute those documents;"

b. "the powers of attorney did not authorize the person executing the note and mortgage on behalf of the partnership to borrow the full amount of the loan."

c. "that although the above-described powers described the property to be mortgaged by reference to a certain "Exhibit B", the exhibit was not attached to all of the powers of attorney that were recorded in the public records of the various Parishes;"

d. "that the "Exhibit B", "does not describe the property which covered by the act of collateral mortgage executed in connection with the exchange loan;"

e. "that the person authorized by the above-described powers of attorney, was himself a witness to some of those powers of attorney, and that many of the powers were not in fact executed in the presence of the notary whose signature appears thereon;"

(Not included in the above case was the following fact.)

f. Additionally, the total obligation that resulted in the exchange included three other lending institutions which were not named nor was the $1,432,000.00 in additional debt which was assumed in the same trasaction mentioned in the said powers.

the River Villa transaction, but rather dealt with one completed some six months prior to the River Villa exchange closing. Just prior to the trial, in April 1988, counsel for River Villa checked the pre-trial document list in the federal criminal action, and discovered that the closing disbursement document of the River Villa exchange was listed for possible use by the U.S. Attorney. Tullos, Fazio, and Blanton were convicted of bank fraud on April 22, 1988. However, the River Villa document was not used in that conviction.

The charge and conviction dealt with an $800,000 bogus loan to Blanton. According to the indictment, "Tullos and Fazio were aware that Blanton lacked the ability to repay the same loan."[5] It was to pay Wicker's profit in that transaction that the $800,000.00 loan to Blanton was made.

Immediately after discovering that the U.S. Attorney had listed the River Villa document, an effort to determine if there was a correlation between the instant transaction and the one leading to the convictions, was begun. The two transactions did involve the identical parties, as to Sun Belt, and included Wicker; and the huge payments that Landry received ($310,000.00), and that Sun Belt received ($200,000.00), shown on the face of the closing documents in the River Villa exchange, implied questionable action, given the fact of the criminal convictions.

Defendants' immediately tried to take Tullos' and Fazio's depositions, but they invoked the protection of the Fifth Amendment. FSLIC was thus allowed to hide behind these shields of constitutional protection, over defendants' objections. Efforts to obtain closing documents from FSLIC were also fruitless at the time, because of technical objections

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[5] After additional discovery by defendants, it could be shown that properties of little value were exchanged from Blanton-controlled companies to Defendants, giving him a profit near the amount of the said $800,000.00 bogus loan.

made by counsel for FSLIC.

Time ran out for such discovery before arguments on both motions for summary judgment were heard by the district court on June 4, 1988. On that day, the district court refused to even consider a delay for the purpose of allowing time for full discovery on this newly uncovered basis for a valid counterclaim, calling attention to the special defenses available to FSLIC in *D'Oench, Duhme, Langley,*[6] and *Hudspeth.*

When the district court denied defendants' motion for summary judgment, and granted FSLIC's motion, a claim was immediately filed with FSLIC in accordance with *Hudspeth.* Defendants requested time to complete discovery of the potential for fraud in a possible tie-in between the two transactions. FSLIC denied the request and an appeal was taken to the FHLBB, where the motion was granted. This allowed a long and very detailed investigation. The results of that investigation were duly pled and rejected by FSLIC. Again, an appeal was taken, and granted by the FHLBB. A stay of execution by FSLIC of the district court's judgment was also subsequently granted defendants by the FHLBB, pending the completion of administrative review by that board. The allegations in the counterclaim are now pending before the district court. They reflect the basic claims shown in the FHLBB action. Also filed was a claim for damages based on FSLIC's negligent supervision at the time of the closing of the instant transaction.

Defendants' claim clearly alleges that the River Villa exchange was expressly part of the original, criminal transaction involving Tullos, Fazio and Blanton. It was designed to cover up the extremely poor credit of Blanton, while the original, criminal transaction was under

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[6] *Langley v. FDIC,* 484 U.S. 86 (1987)

investigation. Further, it was shown that the FHLBB admittedly had knowledge, at the time of the closing of petitioners' mortgage, of sufficient activities at Sun Belt upon which to base a Cease and Desist Order, prior to the consummation of the mortgage. In *FSLIC v. Shelton, et al.*, U.S. Dist. Ct., Middle Dist. of La., CA No. 86-393-B, the following allegation was made by FSLIC:

> During the years 1980 through 1985, pursuant to the regulatory and supervisory powers granted to it by HOLA AND NHA, Bank Board *discovered and advised Sun Belt of many unsafe, and unsound and dangerous business practices and the violation of many regulatory statutes and rules. In November, 1984, the supervisory staff of the Federal Home Loan Bank of Dallas, having found grounds for a cease and desist order, requested Sun Belt to execute A Supervisory Agreement.* (Emphasis added).

The instant mortgage was completed in December 1984.

FSLIC could not even produce a complete loan file on the instant loan; however, sufficient documentation did exist on which any bank examiner could easily have seen the facial defects on the loan documents. Not only were the powers of attorney as compared to the closing documents improper, but the closing letter issued by the Sun Belt loan committee, authorizing the loan to River Villa, was dated the day of the closing, and had not been complied with. Improper and fraudulent appraisals, made months after the transaction, were also part of the documents to be found in Sun Belt's loan file. Some properties had no appraisals, fraudulent or otherwise. In other words, even the most incompetent federal examiner could have detected the true nature of the transaction by the most cursory examination of the records.

Judging from the admission shown above, in all likelihood such was the case.

C. TRIAL COURT'S HANDLING OF EVIDENCE OF FRAUD

At the time of the lower court's judgment, the district court, while recognizing the clear evidence of fraud on the part of Paul Landry, leading up to the faulty powers of attorney, nonetheless refused to allow that evidence to be considered in determining the validity of the issue of ratification which was required to validate the defective notes and mortgage. This was apparently based on *Langley*.

In reviewing the entire matter, the Court of Appeals affirmed this approach, relying on the application of *D'Oench, Duhme*, as supported by *Langley*, to exclude the volumes of uncontested evidence of fraud submitted. In so doing, it actually went directly against its own prior ruling in *Federal Deposit Ins. Corp. v. McClanahan*, 749 F. 2d. 512 (1986).

Then, in dealing with the definition of "fraud in the factum", the appellate court specifically rejected the language of Justice Scalia, set out in *Langley*, as being mere dictum. (App. A-11). Actually, Justice Scalia's opinion in this Court, supports petitioners' position regarding the true definition of "fraud in the factum", and it is hardly dictum, but rather a clear statement of well-established law:

> Respondent conceded at oral argument that the real defense of fraud in the factum - that is, the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents, see U.C.C. § 3-305(2)(c). Comment 7, 2 U.L.A. 241 (1977) - would take the instrument out of § 1823(e), because it would render the instrument entirely void, see Restatement (Second) of Contracts

> § 4.10, at 235, thus leaving no "right, title or interest" that could be "diminish[ed] or defeat[ed]."

484 U.S. at 93-94.

It was defendants' position that where facial defects render nugatory documents on which the entire debt must rest, *D'Oench, Duhme,* and *Langley* simply are not applicable. Those cases and their progeny deal with "secret" or "side" agreements, not the actual closing documents on which the debt is based; thus, they simply cannot be applicable to this fact situation. It was and is the position of petitioners that a threshold question of the validity of the note and mortgage must be addressed before any of FSLIC's special defenses can become applicable under either *D'Oench, Duhme* or *Langley*.

In light of the obvious illegal notes and documents, Louisiana law applied, and no other law should have been considered until that law had been fully dealt with. Had that been the case, then clearly defendants' motion for summary judgment would have been granted.

The application of these special defenses to the question of ratification of the powers of attorney, yields the absurd result that the actions of Paul Landry, the named agent in the powers of attorney, and not the principals, ratified the loan, contrary to the express requirements of Louisiana law.[7] In what state in the country is there any law which would allow the agent named in a power of attorney to ratify his own, illegal, fraudulent actions, taken in defiance of that power of attorney? It is a legal absurdity of the same magnitude as a ruling that a forger can ratify his own forgery.

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[7] LSA-C.C. Arts. 2994-2997 inclusive, and 2817. *Robinson v. Thompson,* 212 La. 186, 31 So. 2d 734 (1947), *First National Bank of Shreveport v. Crawford,* 455 So. 2d 1209 (La. App. 2nd Cir. 1984) *cert. denied* 459 So.2d. 538 (1984).

In this case, while the trial court recognized the substantial body of evidence of fraud, defendants were precluded from having that evidence considered in a motion for summary judgment, where the presence of conflicting facts is to be given paramount consideration. The district court found that the agent, Landry, in effect ratified his own illegal acts by collecting rents as "managing partner" of the partnership. As a result of the exclusion of the evidence of lack of ratification by the makers of the powers, and the fraud shown, the lower court believed that of necessity it had to find ratification on the basis of that single act of rent collection. (District court's opinion, App. A-17.) This was not a limited partnership that had vested innate power in a "managing partner." Here, only the powers of attorney could govern. The defendants did not collect or receive rents, only Landry did. The point is that had the evidence of fraud been allowed to be shown, under these circumstances, no ratification could have occurred, and no debt would ever have come into existence.

In summary, the issue is whether or not, on a motion for summary judgment, defendants should have been precluded from presenting evidence of "fraud in the factum," *Langley*, 484 U.S. at 93, when defects present on the face of the closing documents prima facie raise the question of whether those documents are null and void.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's refusal to remand conflicts with this Court's *Coit* opinion.

The Fifth Circuit has acted in a manner entirely inconsistent with this Court's own recent actions as regards

FSLIC cases where counterclaims denied in the lower court routinely have been remanded under *Coit*.[8] No detailed question was raised as to the merit of the counterclaims and the application of FSLIC defenses; they were simply remanded with two paragraph opinions. The same thing has resulted in this Court, including *Coit*, as well as other circuits.[9] The Fifth Circuit's handling of this case is therefore clearly inconsistent with these decisions.

One of the unique aspects of the case is that the opinion of the Fifth Circuit simply ignores the issue of the second counterclaim, as if it had never existed. This is a direct violation of petitioners' right of federal court review under Article III of the Constitution.

What the Fifth Circuit discussed was the prior counterclaim which was dismissed as untimely filed, with no mention of *Hudspeth*, or the fact that this denial was clearly an abuse of discretion if that were the sole reason for the denial. In this manner, the entire issue was circumvented. Absent any references to *Hudspeth*, defendants' counsel appear to have been negligent in not filing the claim in a timely manner. Since the Fifth Circuit failed to mention that the record was replete with information which demonstrates the

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[8] *Carrollton-Farmers Branch Independent School District v. Johnson & Cravens*, 889 F.2d 571 (5th Cir., Nov. 21, 1989, opinion from Westlaw); *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205, 207-208 (5th Cir. 1989); *Davis v. Federal Savings and Loan Insurance Corp.*, 879 F.2d 1288, 1289 (5th Cir. 1989); *Sandia Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*, 877 F2d 345 (5th Cir. 1989); *Buckner Development Group v. First Savings & Loan of Burkburnett, Texas*, 873 F.2d 858, 859 (5th Cir. 1989); *Cox v. Sunbelt Sav. Ass'n of Texas*, 896 F.2d 958 (5th Cir. 1990).

[9] *Magd E. Zohdi, et al. v. Federal Savings and Loan Insurance Corporation, as Receiver of Sun Belt Federal Bank, F.S.B., et al.*, 109 S.Ct. 1633 (1989); *Federal Savings and Loan Insurance Corporation, as Receiver for Bohemian Savings and Loan Association v. John V. Capozzi, et al.*, 109 S.Ct. 2058 (1989).

impossibility of filing the counterclaim before defendants had exhausted their administrative remedies, the opinion appears a routine recognition of counsels' neglect instead of what in fact it was. It cannot be gainsaid that an earlier filing would have exposed defendants and their counsel to sanctions under Fed. R. Civ. Proc. 11.

With ever-increasing dockets at all levels, the federal judiciary is hamstrung, giving it less and less time with respect to judicial review. However, this enormous burden should not give the Fifth Circuit carte blanche to simply ignore a basic issue, or the rights of the litigants declared by this Court in *Coit*, however it may have occurred.

If this Court allows the Fifth Circuit's crabbed review to go unchallenged, the enormous expense and labor of legal counsel, as well as the effects of this Court's valid judgments, can be circumvented by the simple process of reviewing judges ignoring the issues in their written opinions and placing the blame on the lawyers. The basic integrity of the entire judicial system cries that this not be tolerated.

II.

The Fifth Circuit and the district court have misapplied *D'Oench, Duhme* and *Langley*.

A careful reading of the opinion of the district court will show the steps taken in reaching the result in this case. The court recognized the facial defects that resulted from comparing the powers of attorney and the closing documents. It recognized the substantial evidence of fraud that was used in obtaining the powers of attorney on which the defective notes and mortgage were based. As soon as the words "fraud in the inducement" become descriptive of the nature of the fraud found, an automatic application of the *D'Oench, Duhme* estoppel doctrine is applied. From that point on, an absurd

result is accomplished with the district court recognizing only the evidence of rental collection as an act of ratification to cure the defective powers. All evidence from the actual makers of the powers has been excluded as part of the "fraud in the inducement" exclusion.

This is clearly a misapplication of that doctrine. The Fifth circuit itself, in *Federal Deposit Ins. Corp. v. McClanahan*, 749 F. 2d. 512, 515 (1986), has noted:

> "*D'Oench, Duhme* has not been read to mean that there can be no defenses at all to the attempts by FDIC to collect on promissory notes."

The Fifth Circuit in *McClanahan*, but not here, expressly holds that defects on the face of the documents are outside the constraints of *D'Oench, Duhme* and *Langley*.

We submit that FSLIC must first prove that the notes and mortgages on which the debt is established are without facial defects, before any of the special defenses that have grown out of the application of *D'Oench, Duhme* and *Langley* can be applied. It is important to note that this is not part of the debate over which definition of "fraud in the factum" is applicable. Here we are talking about defects in notes and a mortgage shown on the face of the documents, and a question of Louisiana law over ratification. This deals with the very existence of an obligation that in fact could be entirely void as to these defendants, from its inception. The money loaned did not in any way benefit defendants, it went to admitted felons now serving time in prison, and has resulted in the terrible, continued injustice that has wrecked most of the defendants financially.

Under *Langley*, we submit petitioners have the right to show "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents" which "render[s] the instrument entirely void;"

484 U.S. at 93. The courts below clearly erred in applying *D'Oench, Duhme* to exclude evidence of fraud when the validity of the manner in which the powers of attorney on which the debt was created is the basic question.

CONCLUSION

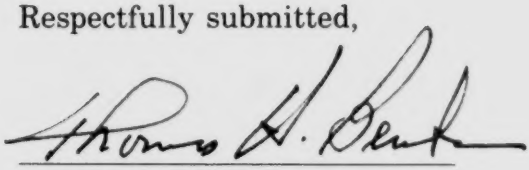
Five years of heroic struggle in the courts below has come to naught. Defendants were innocent, trusting victims; they believed that somewhere under our Constitution, the sheer injustice of the entire matter would be recognized. Criminal fraud, admitted to by the courts below, has been perpetrated upon petitioners at a time when both FSLIC and the FHLBB fully knew of the propensities of the officiers of Sun Belt Bank. Is there to be no end to the power of federal banking regulators to avoid basic responsibility for the consequences of all forms of fraud, even fraud on the face of the closing documents?

The Fifth Circuit's failure to follow this Court's opinion in *Coit* — worse yet, its blind refusal even to mention *Coit* or petitioners' stillborn counterclaim — warrants certiorari here under Rule 17.1(c). *D'Oench, Duhme* has nothing to do with this case. The Fifth Circuit's crabbed reading of *Langley* — refusing to "read dictum therein as creating an exception to *D'Oench* for allegations of fraud in the factum," App. A-11, strips petitioners of the shield of Justice Scalia's reasoning and imperative calls for corrective action by this Court.

The judgment below should be summarily reversed, with directions that under *Langley* and *Coit* summary judgment for FSLIC was error; the case should be remanded to the district court, with an opportunity afforded petitioners to prove their allegations of fraud in the fact, which would

render the underlying obligations entirely void.

Respectfully submitted,



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July 20, 1990

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 89-3011

DR. HENRY McLEMORE, III, ET AL.,
Plaintiffs
versus
PAUL J. LANDRY, ET AL.,
Defendants

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SUN BELT FEDERAL BANK,
Plaintiffs-Appellees
versus
RIVER VILLA PARTNERSHIP, ET AL.,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

April 6, 1990

Before Chief Judge CLARK, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

River Villa Partnership appeals an adverse summary judgment recognizing the rights of the Federal Savings and Loan Insurance Corporation (FSLIC) under promissory notes and a collateral mortgage executed by Paul J. Landry as attorney-in-fact for the partnership. We affirm.

Background

This appeal arises out of an action originally filed by Sun Belt Federal Bank, F.S.B. (Sun Belt) against River Villa and its several partners, jointly and solidarily, to recover on a $1,585,000 promissory note and collateral mortgage executed by Landry. River Villa has 15 partners: Interplan Development, Inc., a Louisiana corporation of which Landry is president, and Drs. Henry McLemore, Thomas Jenkins, Leon Lastrapes III, Gerald Murdock, Francis Elias, Robert Lyons, Charles Smith, Lawrence Tujague, William O'Neill, David Wallin, Patrick Breaux, William Harkrider, Lawrence Broussard, and Gerald Schiff.

The dispositive facts are relatively uncontroverted, although their legal effect is sharply disputed. Landry secured powers of attorney from all but three of River Villa's partners.[1] The powers authorized Landry to exchange properties owned by River Villa on the False River, near Baton Rouge, for properties owned by third persons in Gonzales, Louisiana. In connection with the exchange the powers authorized Landry to borrow $1,550,000 from Sun Belt "at such rates of interest and on such terms and conditions as he deems fit and proper in his sole discretion" and to secure the loan with a mortgage on the Gonzales

[1] Elias, Breaux, and Wallin did not sign powers of attorney for Landry.

properties.[2]

On December 10, 1984, acting as agent and attorney-in-fact for River Villa and its partners, Landry executed instruments effecting the property exchange and a loan of $1,585,000 from Sun Belt to River Villa. The Sun Belt loan was secured by: (1) a demand collateral mortgage note for $1,900,000; (2) a collateral mortgage on the Gonzales properties; (3) a pledge agreement delivering to Sun Belt the collateral mortgage note as security for all of its loans to River Villa; and (4) an assignment to Sun Belt of the rentals from tenants of the Gonzales properties.

River Villa defaulted on the loan payments due May 1, 1985 and thereafter. Sun Belt accelerated the due date of the loan balance and filed suit against River Villa and its partners on the promissory note and collateral mortgage.

After an amended compaint and two third party complaints not relevant to this appeal were filed,[3] Sun Belt was placed in receivership and FSLIC removed the case to federal court. Cross-motions for summary judgment were filed. The district court granted summary judgment for FSLIC, holding River

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[2] The 11 identical powers of attorney each authorized Landry:

> To borrow from Sun Belt Federal Bank, F.S.B. the sum of ONE MILLION FIVE HUNDRED FIFTY THOUSAND AND NO/100 ($1,550,000.00) DOLLARS, at such rates of interest and on such terms and conditions as he deems fit and proper in his sole discretion, and to secure that loan by mortgage on the property described on Exhibit "B" [the Gonzales properties] containing all of the usual and customary provisions for Louisiana mortgages.

In addition, Landry was thereafter authorized "to do all the acts necessary and proper to accomplish any and all of the duties hereabove specified."

[3] River Villa and its partners filed a third party complaint against Landry and Interplan Development. Sun Belt filed an amended complaint adding as defendants Sidney Fazio, Sun Belt's chief counsel who served as closing attorney and notary on the mortgage loan transaction, his law firm, and the

Villa and its individual partners liable, in solido, on the promissory note and recognizing the collateral mortgage.[4] *McLemore v. Landry,* 687 F.Supp. 1038 (M.D.La. 1988).[5] While post-judgment motions from both River Villa and the FSLIC were pending River Villa moved to file a compulsory counterclaim which the district court denied as untimely. Following the trial court's denial of both River Villa and FSLIC's motions to amend the judgment, and River Villa's motion for a stay of execution, River Villa and the "respective individual partners therein, "moved the district court to "enter an order of appeal."

Analysis

A. Jurisdiction

As a threshold consideration we must determine whether we have jurisdiction of this appeal and, if we do, over which parties. Although an administrative panel of this court previously denied a motion by FSLIC to dismiss this appeal for lack of jurisdiction, we are compelled to revisit the issue, *E.E.O.C. v. Neches Butane Products Co.,* 704 F.2d 144 (5th Cir. 1983), for ours is a court of limited jurisdiction. *Thompson v. Betts,* 754 F.2d 1243 (5th Cir. 1985).

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firm's malpractice insurer, in the event River Villa and partners successfully asserted the affirmative defense that the transaction had been invalid. River Villa and its partners later filed thirty-party complaints against Financial Service Corporation Securities, for whom they alleged Landry had been working as a registered representative at the time of the property exchange and mortgage loan transaction, and Interplan Development, Inc.

[4] The district court held the three River Villa partners who had not signed powers of attorney liable for only their virile shares.

[5] The district court entered its judgment pursuant to Fed.R.Civ.P. 54(b).

The "notice of appeal" before us reads in its entirety:

> NOW INTO COURT, comes River Villa, A Partnership, and the respective individual partners therein, defendants in the above-captioned action entitled Sun Belt Federal Bank, F.S.B. v. River Villa Partnership, et al., and moves this Court to allow an appeal and enter an order of appeal in the said action.

Thus drafted, this fails to comply with the requirements of Rule 3(c) of the Federal Rules of Appellate Procedure, which mandates that a notice of appeal "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken."

As to the latter two requirements of Rule 3(c), we deem the instant notice of appeal sufficient, although inartfully drawn. River Villa's intent to appeal the underlying summary judgment and denial of its motion to file a compulsory counterclaim may be gleaned from its "timing" and the status of the case when the "notice" was filed, as subsequently buttressed by the statement of issues and briefs. See *F.T.C. v. Hughes*, 891 F.2d 589, 590 n.1 (5th Cir. 1990); *Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Further, River Villa's intent to appeal to this court is made manifest by the fact that this is the only court to which an appeal may be had.

Despite reaffirming the rubric that courts of appeal should liberally construe Rule 3(c) in favor of appeals, the Supreme Court recently underscored the necessity of an unqualified designation of the party or parties taking the appeal. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), the Court held that the failure to name a party in a notice of appeal was not a mere technical variance but, rather, constituted a jurisdictional defect. The Court held that the designation "et al." did not suffice to

satisfy this requirement. Applying this principle to the instant case we must conclude that the notice of appeal by "River Villa, A Partnership, and the respective individual partners therein," confers jurisdiction solely over the appeal of the partnership, the only named appellant, and leaves this court without jurisdiction as to the appeal of the several partners.[6]

B. River Villa's Defenses to Enforcement of the Note

River Villa raises two defenses to FSLIC's efforts to enforce the $1,585,000 promissory note that Landry executed for the partnership. We consider each in light of the holding of the Supreme Court in *D'Oench, Duhme & Co. V. Fed. Deposit Ins. Corp.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). In *D'Oench*, the Supreme Court held that oral side agreements cannot defeat recovery by the FDIC. Adopted to protect the FDIC "against misrepresentation as to the securities or other assets in the portfolios of the banks which [it] insures or to which it makes loans," 315 U.S. at 457, the *D'Oench* doctrine has since been codified:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or person claiming an adverse

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[6] This case demonstrates the problem inherent in assuming that a generic designation, without more, automatically covers all persons ostensibly aligned on one side of litigation. River Villa is composed of 15 partners. Interplan Development, Inc. of which Landry is president, is one. As noted, it was named as a third-party defendant by River Villa. Its interests obviously are not consistent with the interests of the other partners.

> interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

12 U.S.C. 1823(e). As a common law doctrine *D'Oench* has been extended to protect FSLIC as well as the FDIC. See *Fed. Sav. & Loan Ins. Corp. v. Lafayette Invest. Properties, Inc.*, 855 F.2d 196 (5th Cir. 1988); *Fed. Sav. & Loan Ins. Corp. V. Murray*, 853 F.2d 1251 (5th cir. 1988).

1. *Validity of the powers of attorney.*

We must first determine whether the statute and the *D'Oench* doctrine bar our consideration of the mandates.[7] We conclude that they pass muster for they specifically are referred to in the collateral mortgage, and Landry signed both notes in his representative capacity, thus satisfying *D'Oench* concerns. See *Templin v. Weisgram*, 867 F.2d 240 (5th Cir.), cert. denied, _____ U.S. _____, 110 S.Ct. 63, 107 L.Ed.2d 31 (1989). Accordingly, we address the merits of River Villa's challenge to the validity of the powers of attorney.

River Villa vigorously asserts that it incurred no obligation to Sun Belt on the $1,585,000 promissory note, and its accompanying collateral mortgage, because the completed transaction bore no resemblance to the program contemplated by the individual partners when they signed the mandate

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[7] In Civil Law terminology, powers of attorney are known as mandates. La. Civil Code art. 2985.

authorizing Landry to act on their behalf. In attempting to invalidate its obligation, however, River Villa throws a wide loop, capturing a diverse cast of characters and circumstances well beyond those relevant to the issue at bar. It first contends that Landry incurred a debt for the partnership of over $3,000,000, nearly double the loan authorization in the powers of attorney. It arrives at this sum by adding to the $1,585,000 note given to Sun Belt a total of $1,432,000 in first mortgages held by others on some of the properties received by River Villa in the exchange.[8] That some of the properties received in the exchange were burdened with mortgages might be relevant to the validity of the exchange, but such does not affect the validity of the $1,585,000 promissory note Landry gave Sun Belt on behalf of River Villa to evidence its loan.

The relevant inquiry relates to the River Villa/Sun Belt transaction. Focusing on that we address River Villa's challenge to the transactions's essential validity because the $1,585,000 note exceeded by $35,000 the maximum authorized in the mandate. Is this variance of just over two percent de minimus? Was it subsequently ratified by the partnership as provided by La. Civil Code art. 3010? We pretermit the former and accept the finding and/or conclusion by the district court that the additional $35,000 was ratified when the partnership made payments on the note without protest or reservation. To the extent that this was a finding

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[8] In an effort to enhance its argument that Landry incurred an obligation far greater than that authorized, River Villa decries Landry's execution of the $1,900,000 "collateral mortgage note" on its behalf. Unlike the $1,585,000 promissory note, this note does not reflect River Villa's debt to Sun Belt. Rather, it creates a fictitious debt that can be secured by a collateral mortgage which is then pledged as security for a real debt. This "straw" transaction is a Louisiana security device commonly used by lenders to obtain a secured position on property to protect both past and future loans to the debtor. See *Texas Bank of Beaumont v. Bozorg*, 457 So.2d 667 (La. 1984).

of fact by the district court it is protected by the clearly erroneous shield of Fed.R.Civ.P. 52(a). To the extent it was a conclusion of law, we perceive no reason to vary from the rule that "we customarily defer to the district judge in a diversity case involving interpretation of the law of the state in which the judge sits." *USX v. Tanenbaum*, 868 F.2d. 1455,1457 (5th Cir. 1989).[9]

River Villa next asserts that Landry exceeded his authority by binding the partners jointly and solidarily on the promissory note despite the absence of specific authorizing language in the powers of attorney. River Villa correctly observes that the obligation of solidary liability may not be presumed but must be expressly undertaken. La. Civ. Code art. 1796. The solidary obligations undertaken on behalf of all parties-signatory in the Sun Belt promissory note is indeed express. River Villa contends, however, that the language of the mandate must be equally express. Civil Code article 2996 provides that "[i]f it be necessary to alienate or give a mortgage, or any other act of ownership, the power must be express." Article 2997 continues by listing the specific acts for which the granted power must be express, including, *inter alia*, the authority:

> To sell or buy.
> To incumber or hypothecate.
> . . .

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[9] River Villa raises two other arguments regarding the property exchange in an effort to invalidate its promissory note obligation. First, River Villa argues that it acquired only 75 units rather than 95 as Landry had promised. River Villa then complains that on 40 of the 75 units acquired Sun Belt took a second, rather than a first mortgage. Neither the powers of attorney nor the promissory note refer to the number of units to be exchanged or to whether Sun Belt's mortgage would be a first or second mortgage. The collateral mortgage did, however, list the partnership property subject thereto. We reject again River Villa's efforts to invalidate its obligation on the Sun Belt promissory note by reference to the property exchange.

To contract a loan or acknowledge a debt.
To draw or indorse bills of exchange or promissory notes.
. . .

This listing is exclusive. See *Hawthorne v. Kinder Corp.*, 513 So.2d 509 (La.App. 1987).

The power of attorney specifically authorized Landry to borrow $1,550,000 from Sun Belt "on such terms and conditions as he deems fit and proper in his sole discretion, and to secure that loan by mortgage on [the Gonzales properties]." We hold that the execution of the promissory note and collateral mortgage was consistent with the powers of attorney and Louisiana law.

River Villa's final challenge based on the disbursement of the loan proceeds is barred by the *D'Oench* doctrine. The mandates do not address disbursement. River Villa therefore may not urge disbursement as a defense to the claim by FSLIC.

2. *Allegations of fraud.*

As its second line of defense River Villa alleges fraud on the part of Landry, Sidney Fazio, and A. Larry Tullos, Sun Belt's former president. River Villa alleges that Landry fraudulently misrepresented the number of properties that it would receive in the property exchange in order to induce the partners to execute the powers of attorney. River Villa's allegations that it was defrauded by Fazio and Tullos are extrapolated from the fact that the two were convicted, and Fazio was sued by FSLIC, as a consequence of an unrelated transaction involving different companies, for making false entries to conceal violations of the loan-to-one-borrower rule. The district court found that River Villa had presented no summary judgment evidence of fraud to preclude a ruling in favor of FSLIC. River Villa argues that its allegations

presented a genuine issue of material fact that should have vitiated summary judgment, at least until further discovery could be had.[10]

Any issue of fact arising out of River Villa's allegations of fraud is rendered nugatory by the *D'Oench* doctrine as expanded in *Langley v. Fed. Deposit Ins. Corp.*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987).[11] In *Langley*, the Supreme Court, interpreting 12 U.S.C. 1823(e), held that misrepresentations therein constituted conditions to payment of a note and were precluded by the concerns underlying *D'Oench* and its codification from being asserted against the FDIC as a defense to its recovery on a debt. Following *Langley*, we have held that misrepresentations to borrowers cannot be asserted as a defense to recovery by FSLIC on facially unqualified loan documents. See *Murray*, 853 F.2d at 1255; *Fed. Sav. & Loan Ins. Corp. v. Lafayette Invest. Properties*, 855 F.2d at 198.

River Villa argues, nonetheless, that its partners were victims of fraud in the factum, which, it contends, *Langley* recognized as an exception to the *D'Oench* doctrine. This argument is misdirected, both legally and factually. *Langley* concerned misrepresentations that amounted to fraud in the inducement. We previously have declined to read dictum therein as creating an exception to *D'Oench* for allegations of fraud in the factum. See *Templin*, 867 F.2d at 242. Were we to assume the existence of such an exception, however, the fraudulent acts alleged by River Villa would not be fraud

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[10] River Villa asserts that it attempted to depose Fazio and Tullos after their convictions, but that both invoked the fifth amendment.

[11] River Villa's argument that *D'Oench* and *Langley*, as applied to the FSLIC, were effectively overruled by the Supreme Court's decision in *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, _____ U.S. _____, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989), is without merit. *Coit* did not address the application of the *D'Oench* doctrine.

in the factum; they would constitute fraud in the inducement. Fraud in the factum occurs when a party signs a document "without full knowledge of the 'character or essential terms' of the instument." *Templin,* 867 F.2d at 242 (citation omitted.)[12] River Villa does not allege, nor could it, that its partners did not know that they were signing powers of attorney in favor of Landry. Rather, it maintains that Landry lied to the partners to induce them to sign what they admittedly knew to be powers according Landry broad discretion. Such clearly falls within the scope of *Langley.*

C. *River Villa's Motion to File a Compulsory Counterclaim*

Finally, River Villa contends that the district court erred in refusing to grant its motion for leave to file a compulsory counterclaim alleging misrepresentation in connection with the property exchange and loan transaction. The district court denied the motion as untimely. We cannot conclude that the district court abused its discretion in so ruling. River Villa offered this motion six months after moving for summary judgment, five and one-half months after the FSLIC moved for summary judgment, six weeks after the court's ruling on these motions, and almost three years after Sun Belt first filed suit. The motion was untimely filed. See Fed.R.Civ.P. 13(f); *Imperial Enterprises, Inc. v. Fireman's Fund Ins. Co.,* 535 F.2d 287 (5th Cir. 1976).

The judgment of the district court is in all respects AFFIRMED.

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[12] As illustrated in Official Comment 7 to 3-305 of the Uniform Commercial Code, fraud in the factum arises in a situation such as

> that of the maker who is tricked into signing a note in the belief that it is merely a receipt or some other document. The theory of the defense is that his signature on the instrument is ineffective because he did not intend to sign such an instrument at all.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CONSOLIDATED CASES:

DR. HENRY MCLEMORE, II, ET AL CIVIL ACTION
VERSUS NUMBER 86-238-B
PAUL J. LANDRY, ET AL

SUN BELT FEDERAL BANK, F.S.B. CIVIL ACTION
VERSUS NUMBER 86-359-B
RIVER VILLA PARTNERSHIP, ET AL

DR. DAVID WALLIN, ET AL CIVIL ACTION
VERSUS NUMBER 87-401-B
FSC SECURITIES CORPORATION, ET AL

DR. LAWRENCE TUJAGUE, ET AL CIVIL ACTION
VERSUS NUMBER 86-825-B
PAUL J. LANDRY, ET AL

OPINION

This action was originally filed in the Nineteenth Judicial District Court for the Parish of East Baton Rouge. In the state court suit, Sun Belt Federal Bank, F.S.B. ("Sun Belt") filed suit against the defendants River Villa, a Louisiana partnership, Interplan Development, Inc., a Louisiana corporation, and Drs. Henry McLemore, Thomas Jenkins, Leon Lastrapes III, Gerald Murdock, Francis Elias, Robert Lyons, Lawrence Tujague, William O'Neill, David Wallin, Patrick Breaux, William Harkrider, Lawrence Broussard and

also against Charles Smith and Gerald Schiff in connection with a promissory note and mortgage executed on behalf of these defendants by Paul J. Landry on December 10, 1984, in the original amount of $1,585,000.[1] After Sun Belt closed, the Federal Savings and Loan Insurance Corporation ("FSLIC") was substituted as a party plaintiff in its capacity as a duly appointed receiver of Sun Belt Federal Bank, F.S.B. Thereafter, the suit was removed to this court. The matter is now before the court on cross motions for summary judgment filed by the FSLIC as well as River Villa Partnership. The court has heard oral arguments in this case and for reasons which follow finds that the motion of FSLIC for summary judgment should be granted. The court further finds that the motion of River Villa Partnership for summary judgment should be denied.

The facts in this case are not in dispute. Paul J. Landry induced the partners of River Villa Partnership to execute individual powers of attorney authorizing Landry to perfect an exchange of partnership properties. The powers of attorney gave Landry authority to exchange False River Properties, owned by the partnership, for certain properties located in Gonzales, Louisiana, which were owned by a third party. Landry was also authorized in the power of attorney to borrow $1,550,000.00 from Sun Belt on behalf of the River Villa Partnership. It is clear that both the exchange and the financing were to be done "all on such terms and conditions as the agent deems fit and proper in his sole discretion."[2] Sun Belt then made a loan to River Villa Partnership and its individual partners on December 10, 1984. This loan was evidenced by a promissory note executed by Landry as president of Interplan Development, Inc., the managing partner of River Villa Partnership, and as the attorney in

[1] The court will refer to the defendants collectively as the River Villa Partnership.

[2] Power of Attorney, See FSLIC Ex. 3-12.

fact for the individual partners by virtue of certain powers of attorney executed by those individual partners in favor of Landry. As security for the loan by Sun Belt to River Villa and its partners, Landry, as attorney in fact for the partners and the partnership and as the authorized representative of the managing partner, Interplan Development, Inc., executed the following documents: (1) an authentic act of collateral mortgage dated December 10, 1984, affecting certain tracts of land located in Gonzales, Louisiana; (2) a collateral mortgage note dated December 10, 1984, in the principal amount of $1,900,000.00 payable on demand and made payable to the order of Itself; (3) a promissory note dated December 10, 1984, in the amount of $1,585,000.00 payable to the order of Sun Belt Federal Bank, F.S.B.; (4) a collateral pledge agreement whereby the aforesaid collateral mortgage note was pledged and delivered to Sun Belt as security for any and all loans made by Sun Belt to River Villa; and (5) a notarial act of assignment of leases and rents dated December 10, 1984.

A review of the record reveals that Landry signed the above documents and accomplished the exchange, but not according to certain side agreements Landry had made with the partners.[3] The properties received by River Villa were poor investments. Furthermore, there is evidence in the record which strongly suggests the appearance of fraud by Landry in connection with his activities in this transaction. Thereafter, the partnership stopped payment on the notes and Sun Belt filed suit in state court. When the partnership declined to make payments on the note, the entire loan by Sun Belt to River Villa became due on May 1, 1985.[4] The

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[3] It must be noted that Sun Belt Federal Bank, F.S.B. was not a party to these side agreements.

[4] Under the terms of the mortgage and promissory note, the entire balance of the loan is now due.

balance due on the note is $1,584,018.45, together with accrued interest through January 27, 1988 in the sum of $577,670.86. The per diem interest accrues at the rate of $592.00 per day.

In its motion for summary judgment, FSLIC seeks judgment in accordance with the notes and affidavits attached thereto and seeks recognition of the mortgages which were previously described above. However, FSLIC does not seek at this time to impose joint and solidary liability on Dr. Francis Elias, Dr. Patrick Breaux and Dr. David Wallin because of their apparent failure to execute powers of attorney in favor of Landry. Insofar as these three defendants are concerned, the Receiver seeks judgment in its favor against these individuals for their pro rata and virile shares.

River Villa strenuously opposes FSLIC's motion for summary judgment. River Villa contends that FSLIC cannot recover on the notes as a matter of law because the powers of attorney authorizing the notes are defective. River Villa further contends that even if the powers of attorney are not defective, FSLIC is estopped from recovery because it bought the notes with knowledge of their fraudulent origin. These contentions are without merit.

The record in this case fails to reveal how the powers of attorney executed in favor were invalid. A power of attorney need not be in authentic form. See Louisiana C.C. Article 2992; *Weinhardt v. Weinhardt,* 214 So.2d 254 (La. App. 4th Cir. 1968) *appl. denied* 253 La. 57, 216 So.2d 305 (1968). Thus, the fact that Landry appeared as a witness on the powers of attorney is immaterial. Under Louisiana law a power of attorney must be express in order to buy or sell property, but it need not contain a specific property description. Louisiana C.C. Article 2997; *Resweber v. Daspit,* 240 So.2d 376 (La. App. 3rd Cir. 1970). Thus, the absence of the property description referred to as Exhibit B in the power of attorney is not fatal to the agreement. Furthermore, the inadvertent reversal of

the captions to the property descriptions found in the mortgage is also not material. Finally, the fact that the property descriptions in the mortgage included property in addition to that authorized by the partners does not make the powers of attorney null and void. This issue and the fact that Landry borrowed in excess of the limits set forth in the power of attorney must be considered by the court in connection with the issue of whether or not River Villa ratified these actions.

In order for there to be a ratification, there must be a clear and absolute intent on the part of River Villa to ratify the actions of Landry. *First National Bank of Shreveport v. Crawford,* 455 So.2d 1209 (La. App. 2nd cir. 1984), *cert. denied* 459 So.2d 538 (1984). A party with full knowledge of all of the facts who accepts the benefit of a contract is deemed to have ratified the contract and is precluded from repudiating the agreement. *Francis v. Bartlett,* 121 So.2d I8 (La. App. 2nd Cir. 1960). However, silence in the absence of any knowledge of material facts does not constitute ratification. *Robinson v. Thomson,* 212 La. 186, 31 So.2d 734 (1947). Applying these principles to the facts of this case, the court finds that the partners ratified the actions of Landry which are relevant to the motion before the court. The partners authorized Landry to execute the $1,900,000.00 collateral mortgage and to bind the partners in solido. It is also clear that Landry had the express authority to secure the $1,550,000.00 debt. Landry was also authorized to secure principal obligations with collateral mortgages in excess of the principal amount. The broad authority given to Landry in the powers of attorney to finance the exchange supports the court's decision in this case. The powers of attorney authorized Landry to finance the exchange on "such terms and conditions as he deems fit and proper in his sole discretion". *Strahan v. Garis,* 183 So.2d 392 (La. App. 4th Cir. 1986) *cert. denied* 184 So.2d 26 (1966). The parties also ratified Landry's actions by renting the

property, paying part of the loan he made on their behalf and authorizing the exchange of the New Roads and Gonzales properties.

The court further finds that *Langley v. FDIC,* _____ U.S. _____, 108 S.Ct. 396 (1987) applies under the facts of this case. *Langley* provides that a maker who has been fraudulently induced by a bank official to sign a note cannot assert the defense of fraudulent inducement against the FDIC. The court in *Langley* further held that the FDIC's knowledge of the misrepresentations prior to its purchase of the asset is not relevant to whether the agreement must satisfy the recording requirements of 12 U.S.C. 1823(e). River Villa contends that *Langley* does not apply to the facts of this case because the fraudulent inducement did not involve a side agreement triggering § 1823(e) and the *Langley* decision. River Villa further contends that without *Langley,* FSLIC would be treated as any other holder of a note and would be subject to the notice defenses of § 3-304 of the Uniform Commercial Code.

River Villa's contentions are without merit. Section 1823(e) and the *Langley* decision are applicable the instant a side agreement conditions the recovery on a note. The court must also reject River Villa's contention that *Langley* only applies to fraudulent inducement by a banking official and does not apply to fraud committed by a party one step removed. If *Langley* protects FSLIC from a fraud perpetrated by a bank which is insured by FSLIC, *a fortiori, Langley* must also protect FSLIC from a fraud perpetrated by a third party from whom the agency has absolutely no connection.

Finally, the court finds no evidence of "fraud in the factum" that would render *Langley* inapplicable. See also *FDIC v. Morrison,* 816 F.2d 679 (6th cir. 1987). Because the court finds *Langley* applicable to the facts of this case, FSLIC's motion for summary judgment should be granted. As noted earlier, a judgment here shall be rendered in solido as to all

defendants except Dr. Francis Elias, Dr. Patrick Breaux and Dr. David Wallin, who shall be liable to FSLIC for their pro-rata and virile shares. In all other respects, the defendants shall be liable in solido to the plaintiff herein. Counsel for FSLIC shall prepare a judgment which shall be submitted to counsel for River Villa for approval as to form. This document shall be filed with the court within 15 days from the date of this opinion.

The court further finds that no just reason exists for delaying entry of judgment herein and, in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, hereby authorizes the clerk to enter final judgment on FSLIC's motion for summary judgment.

Baton Rouge, Louisiana, June 3, 1988.

Frank J. Polozola
UNITED STATES DISTRICT JUDGE

In the United States Court of Appeals for the Fifth Circuit

No. 89-3011

DR. HENRY McLEMORE, III, ET AL.,
Plaintiffs
versus
PAUL J. LANDRY, ET AL.,
Defendants

****

SUN BELT FEDERAL BANK,
Plaintiffs-Appellees
versus
RIVER VILLA PARTNERSHIP, ET AL.,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

ON PETITION FOR REHEARING

April 25, 1990

Before CLARK, Chief Judge,
POLITZ and WILLIAMS, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied*.

ENTERED FOR THE COURT:
Henry A. Politz
United States Circuit Judge

United States District Court
Middle District of Louisiana
Baton Rouge, La. 70801

April 25, 1989

Chambers of
Frank J. Polozola
Judge

Mr. Thomas H. Benton
601 St. Ferdinand Street
Baton Rouge, Louisiana 70802

Re: Sun Belt Federal Bank v. River Villa Partnership, et al

Dear Mr. Benton:

There will be no ruling made on the pending Rule 60(b)(6) motion until the Fifth Circuit Court of Appeals rules on your appeal.

Very truly yours,

Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

FJP/JG

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

SUN BELT FEDERAL BANK F.S.B.
VERSUS CIVIL ACTION NO. 86-359-B
RIVER VILLA PARTNERSHIP, ET AL.

SUPPLEMENTAL COMPULSARY COUNTERCLAIM OF RIVER VILLA AGAINST FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, (FSLIC), AS RECEIVER OF SUN BELT FEDERAL BANK, F.S.B., AND DIRECT ACTION FOR DAMAGES AGAINST FSLIC FOR VIOLATION OF FIDUCIARY OBLIGATIONS AND FOR NEGLIGENCE

JURISDICTI0N FOR SUPPLEMENTAL COMPULSORY COUNTERCLAIM

1.

This Court has ancillary jurisdiction over this compulsory counterclaim; the justification for filing this action is the ruling of the Supreme Court of the United States in *Coit Independence Joint Venture v. FSLIC as Receiver for FirstSouth F.A.*, Docket No. 87-996, October Term 1988, rendered March 21, 1989, which allows this Court to now assume immediate jurisdiction of all claims filed against Sun Belt Federal Bank, F.S.B. ("Sun Belt"), through FSLIC as the Receiver, for a trial *de novo* of all such claims. The fact that an appeal was lodged with the Fifth Circuit Court of Appeals on a judgment rendered in favor of Sun Belt, prior to *Coit*, does not preclude the filing of this action as of right, considering that this court has retained jurisdiction of the bifurcated portion of the case, and *Coit* having overruled the

decision that had stripped this Court of its jurisdiction. This compulsory counterclaim is now authorized, under Rule 13(a) of the Federal Rules of Civil Procedure, only in District Court.

2.

Defendants reallege and incorporate by this reference all of the allegations of fact previously plead in all responsive pleadings filed on their behalf in the captioned action and, subject to the changes shown herein, their Amended Answer and Counterclaim which was denied by this Court under *North Mississippi Sav. & Loan Ass'n. v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 US 1054 (1986).

3.

Defendants show that a substantial portion of the facts alleged in this compulsory counterclaim were discovered after the initial June 4, 1988 judgment, and that almost all of the said alleged facts were plead in the administrative proceeding that was in the process of review before the Federal Home Loan Bank Board when the *Coit* decision was rendered on March 21, 1989.

4.

Defendants allege the following clear acts of fraud, amounting to both fraud in the inducement and fraud in the factum on the part of the former President of Sun Belt, its senior legal counsel, and its appraisers and employees, in bringing about the mortgage and note which are the subject of the present judgment of this Court.

COUNT I.
FRAUD IN THE FACTUM

5.

Defendants show that during the years 1982 to 1985 Mr. Seaborn R. "Steve" Wicker ("Wicker") was engaged in the business of orchestrating "tax free exchanges" under Section 1031(a) of the Internal Revenue Code; that he acted as the instigator and middleman in two such transactions with Sun Belt in 1984, the first one leading to the criminal convictions of A. Larry Tullos, Sidney D. Fazio and Michael E. Blanton for federal bank fraud, and the second, and related transaction, to the exchange resulting in the note and mortgage which are the subject of this action; that at all times Wicker was a principal organizer, coordinator, and benefactor of both transactions and a central person along with Tullos and Fazio who brought about the closing of the transactions; that at all times pertinent to these two transactions Wicker was represented individually and by members of the law firm of Mr. John Dale Powers, which had various names and is now Powers, Vaughn and Clegg, who have also been lead counsel in the present action against movants representing FSLIC; and that this was a fact admittedly known and accepted by FSLIC after full disclosure by Mr. Powers.

6.

A "SUPERCEDING INDICTMENT FOR CONSPIRACY, FALSE ENTRIES, AND MISAPPLICATION OF FUNDS" was filed by the Federal Grand Jury in the criminal action on January 20, 1988, against Tullos, Fazio, and Blanton, and as a matter of record, after due hearing and trial, they were found guilty on all counts in a trial held in the Spring of 1988.

7.

Among the charges on which the said parties were found guilty, were Counts Two, Three, Four, and Five: "False Entries", which dealt with an $800,000.00 loan made to Blanton's Corporation, Ridgeland Builders, Inc., as a "mere nominee", in order to cover the fact that loan limits were being exceeded in a transaction designed to remove a $5,000,000.00 defaulted loan from Sun Belt's books.

8.

The facts show that the said $800,000.00 so generated went to Wicker for his part in the transaction as the "middleman" referred to in the indictment.

9.

Shortly after completing the transaction described in the indictment, Wicker began negotiating with Paul J. Landry who, as has been previously alleged in detail, was attempting to complete his own fraudulent action against defendants, the negotiations for which involved Tullos, Fazio and Blanton.

10.

Acting on behalf of the said Sun Belt, Tullos caused to be approved a transaction which released Blanton from $926,000.00 worth of obligations, including $200,000.00 at Sun Belt, all secured by grossly under-valued apartments worth at that time less than half this amount, substituting the individual River Villa partners as guarantors on the

entire bogus transaction; said actions being taken in an attempt to cover Blanton's desperate financial condition and justify the loan that was to become the basis for the criminal action.

11.

By November 1984 the supervisory staff of FSLIC (Dallas Bank) found grounds for a Cease and Desist Order, and demanded that Sun Belt execute a Supervisory Agreement which was not executed until March 21, 1985; between the time of that demand and the execution of the Supervisory Agreement, the transaction resulting in the obligation that is the subject of this suit was closed, on or about December 10, 1984.

12.

The defects that were found or should have been found in Sun Belt's files during the regulatory examinations by FSLIC following the Cease and Desist Order, would have shown the following defects in the closing documents which would have revealed fraud in the factum:

a. The Commitment Letter for the loan, listing the pre-closing conditions, was issued and dated the same date as the closing, was not signed by Landry, and during the discovery of documents, FSLIC was unable to produce a body of documents showing that any of the requirements dealing with value or credit were fully met prior to the closing, excepting Fazio's title policy, which was in itself negligently issued.

b. The property that was the primary security for the loan was not appraised until more than eight months

after the closing, and then was fraudulently appraised on its face, describing "condo conversions", when in fact the units were obviously nothing more than poorly constructed apartments, in run-down or incomplete condition, and worth substantially less than shown; eight of the units were never appraised.

c. The loan otherwise followed the same pattern of incompetence, negligence, and fraud found by FSLIC examiners both before and after the said exchange and mortgage were closed, giving rise first to the threat of a Cease and Desist Order, then to the Supervisory Agreement, and finally to a Purchase and Assumption Transaction giving rise to a full Receivership in May of 1986; this pattern in the handling of most of the commercial loans then being closed by Sun Belt is shown and admitted to by FSLIC in that action pending before this Court entitled *Federal Savings and Loan Insurance, Receiver of Sun Belt Federal Bank, F.S.B. v. Wendell P. Shelton, et al.*, Civil Action No. 86-393-B.

d. The examination of the action which resulted in the criminal case and convictions, dealing as it did with Michael Blanton, would, as a matter of standard auditing procedure, have revealed the second, and related, River Villa exchange, which followed; it would also have revealed the obvious nature of the fraudulent transaction associated with the closing of the subject loan.

e. The bank auditor examining Sun Belt's files knew or should have known of the incomplete nature of the powers of attorney which were used to close the loans, all of whose defects have been previously alleged and are incorporated herein by reference thereto.

COUNT III.
ESTOPPEL

14.

Defendants show that the loan by Sun Belt otherwise followed the same pattern of incompetence, negligence, and fraud found by FSLIC examiners before the said exchange and mortgage were closed, yet with full knowledge of the on-going and pervasive actions of the Sun Belt officers FSLIC did not complete the Purchase and Assumption Transaction leading to the full Receivership until May 1986; this pattern in the handling of most of the commercial loans of this size then being closed by Sun Belt is shown and admitted to in that action pending before this Court entitled *Federal Savings and Loan Insurance, Receiver of Sun Belt Federal Bank, F.S.B. v. Wendell P. Shelton, et al.*, Civil Action No. 86-393-B, any claim of lack of knowledge now being subject to an express defense of estoppel against FSLIC as Receiver.

SUMMARY

15.

Defendants show that considering all of the allegations of fraud previously plead; the pre-existing knowledge of FSLIC examiners concerning the nature of the management by the then president of Sun Belt, Larry Tullos, and his express use of the relationship with Blanton; the lack of supporting documents normally required in loans of this nature and magnitude; and the obvious fraudulent intent of the parties to damage Defendants; the note should be discharged on the basis of the ability of Defendants to show newly discovered

evidence which can be filed with this Court as a result of the *Coit* decision, providing fraud in the factum and estoppel.

COUNT IV.

COUNTERCLAIM AGAINST FSLIC INDIVIDUALLY FOR VIOLATION OF FIDUCIARY OBLIGATIONS TO THE DEFENDANTS AS CREDITORS, AND FOR NEGLIGENCE

JURISDICTION

16.

Defendants show that the Supreme Court in *Coit* expressly recognized the right of the plaintiff, Coit, to pursue its own action for $113 million which alleged usury, based on oral agreements, and alternatively for violation of fiduciary duty and implied duty and good faith and fair dealing. In so doing it upheld the obligation of FSLIC in its capacity as Receiver to afford creditors their rights in its handling of the affairs of a defaulted Savings Bank. It also recognized a right of action against FSLIC in that it could "sue and be sued, complain and defend, in any court of law - county, state or federal." (*Coit,* Slip Opin., p. 14.) The following allegations thus fall within the parameters allowed by *Coit.*

17.

This claim is filed against FSLIC as Receiver for damages that have resulted or may result to Defendants.

18.

First, it is asserted that FSLIC is jointly and solidarily liable with Sun Belt for allowing the president, Larry Tullos, and other officers, agents, and employees of Sun Belt to continue to operate and make loans to unsuspecting borrowers, and in particular the Defendants herein, after FSLIC positively knew of the fraudulent and negligent nature of the operations of Sun Belt, thus allowing the fraudulent loan which is the subject of this litigation to result.

19.

Secondly, and alternatively, Defendants assert a claim for damages that have resulted or may result to them by reason of FSLIC's failure in its fiduciary capacity as Receiver, including acts of negligence, to afford the Defendants their right to the pro-rata distribution of Sun Belt's assets, and for what is perceived further as an active attempt to prevent the sharing of such assets in order to enhance the position of FSLIC in its capacity as a creditor to such assets.

COUNTS V. AND VI.

ACTION FOR DAMAGES BASED ON NEGLIGENCE AND ALTERNATIVELY BREACH OF FIDUCIARY RESPONSIBILITY

20.

Defendants specifically plead all of the facts previously plead in the original answer and the amendments attempted hereinabove. In addition to these facts, Defendants show that

FSLIC has deliberately isolated the Defendants because of their apparent ability to pay the judgment, and has pursued them with huge expenditures of legal cost, knowing the true nature of the facts surrounding the fraudulent actions of Sun Belt, Tullos, Fazio, Blanton and Seaborn R. "Steve" Wicker (Mr. Wicker's activities are the subject of certain allegations to be filed this week in that action entitled *FSLIC as Receiver of Sun Belt, Federal Bank, F.S.B., v. Sidney D. Fazio, et al.*, filed herein as Civil Action No. 89-328-A), as well as the long-standing nature of the manner of operation at Sun Belt long before the Defendants were involved in the alleged loan, and long before they were able to discover such facts; and then in hiring the attorneys who had represented Wicker in the very transactions which are the basis for this action, to prosecute the case.

21.

Defendants show that in fact, well in advance of the actual exchange and creation of the subject mortgage and note, the supervisory staff of the Federal Home Loan Bank of Dallas had found "grounds for a cease and desist order", and in November of 1984, prior to the said note and mortgage (dated December 10, 1984), had demanded that Sun Belt execute a Supervisory Agreement dealing expressly with compliance with regulations and safe and sound lending practices, and with compliance with regulations for appraisals and related underwriting policies and procedures which were not being followed and were almost universally violated by Sun Belt in the area of commercial loans.

22.

These facts are actually plead in a complaint the

Defendant's legal counsel have just discovered was filed herein on June 12, 1986, *Federal Savings and Loan Insurance Corporation, Receiver of Sun Belt Federal Bank, F.S.B. v. Wendell P. Shelton, et al.*, Civil Action No. 86-393-B. On information and belief, the status of the recent allegations is that negligence is claimed on some 135 different loans that give rise to damages under the officers' liability policy. A smaller number of loans (not known at this time) are also listed under the fiducuary bond policy for fraud.

23.

Again quoting from the pleading in that action, the Defendants show that the Home Loan Bank Board and its arm, FSLIC, had known as early as "1980 through 1985, [that] pursuant to the regulatory and supervisory powers granted to it by HOLA and NHA, the Bank Board discovered and advised Sun Belt of many unsafe, unsound and dangerous business practices and the violation of many regulatory statutes and rules." (See paragraph 12 of the complaint in Civil Action No. 86-393-B.)

24.

Defendants show that nowhere does FSLIC assert any claim under the instant mortgage and note, even considering the facts they possessed at the time of the filing of the original suits against the Defendants, all of which may have defeated Defendants' rights for participation in a judgment in that action as a creditor whose obligations could have been paid.

25.

Defendants show that FSLIC is jointly and solidarily liable with Sun Belt for all damages resulting from its actions for the following specific reasons:

a. For sanctions, including reasonable attorneys' fees for defense of this action under Rule 11 of the Federal Rules of Civil Procedure, which is expressly reserved until the completion of this action;

b. In the alternative, for sanctions, including attorneys' fees, for defense of this action under 28 U.S.C. Sec. 1927, which is expressly reserved until the completion of this action;

c. for gross negligence in allowing the officers (Larry Tullos in particular), employees, and agents of Sun Belt to continue to operate without proper supervision after discovering grounds for a Cease and Desist Order, thus allowing the River Villa exchange and loans to be closed to the detriment of the Defendants after FSLIC possessed knowledge of the aforementioned serious problems at Sun Belt;

d. For gross negligence in allowing the said Sun Belt officers and agents to operate under the Supervisory Agreement in such a manner as to actually perform acts of fraud as to the appraisals in regard to the alleged loan made Defendants;

e. For gross negligence for waiting until May 1, 1986 to actually place the said Sun Belt into full receivership, all of which, when added to the above acts of negligence, may result in the loss of the right of compensation under Sun Belt's fidelity bond;

f. Alternatively, if the Defendants are found to be liable for the said debt, FSLIC violated, and is violating on an on-going basis, its fiduciary responsibilities to protect the assets of the bank in receivership in such a manner as to pay all just claims to established creditors, the Defendants being such creditors;

h. FSLIC will be unjustly enriched at the expense of Defendants if the judgment of this Court is executed on, considering the facts now known and hereinabove set forth as to FSLIC; and

i. FSLIC hired and allowed the same law firm to prosecute the action against the Defendants in this case that had represented one of the co-conspirators, Seaborn R. "Steve" Wicker, who had been a principal middleman and organizer of the fraudulent scheme by which the Defendants were enticed to participate in the transaction resulting in the subject mortgage and note; thus, with full knowledge, FSLIC created a conflict of interest in the fair and impartial review of the rights of the Defendants during the course of all of the pleadings in this case, in total violation of its fiduciary relationship to the Defendants as creditors of Sun Belt.

26.

Defendants assert the following damages:

a. Sanctions as may result under Rule 11, Fed.R.Civ.Proc;

b. Such damages as may result under 28 U.S.C. Sec. 1927;

c. For the emotional upset, mental stress, losses caused by damage to credit, lost income, and legal expenses, all as caused the Defendants as a direct result of the alleged negligent actions of FSLIC, which said damages as will hereafter be more fully shown, but not less than $1,000,000.00 per individual defendant; and

d. Alternatively, FSLIC is jointly and solidarily liable with Sun Belt for any damage that may be found by reason of the amended Judgment on Summary Judgment rendered by this Court December 16, 1988, and all related cost.

WHEREFORE, Defendants, River Villa Partnership, and the respective individual partners therein, pray for judgment in their favor and against FSLIC as receiver of Sun Belt

Federal Bank, F.S.B., individually, jointly and solidarily for negligence, breach of fiduciary, fraud, aiding and abetting violation of Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 77j(b), and Rule 10b-5 thereunder, 17 CFR Sec. 240.10b-5; for tortious enforcement of the judgment entered against defendants herein the 16th day of December, 1988; for such sums as defendants are able to prove at trial hereof; for attorneys' fees; for all costs of these proceedings; and for interest at the legal rate from date of judicial demand, on any judgment awarded to defendants.

Respectfully submitted:

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CERTIFICATE

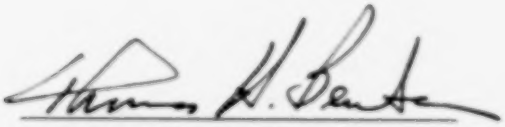
I, the undersigned, do hereby certify that I mailed a true and correct copy of the above and foregoing pleading with postage pre-paid fully thereon, to Mr. Richard Curry, RUBIN, CURRY, COLVIN & JOSEPH, Suite 1400, One American Place, Baton Rouge, Louisiana 70825; Mr. W. Shelby McKenzie, TAYLOR, PORTER, BROOKS & PHILLIPS, 451

Florida Boulevard, 8th Floor, Baton Rouge, Louisiana 70801; Mr. John Dale Powers, POWERS, VAUGHN & CLEGG, Post Office Box 15948, Baton Rouge, Louisiana 70895; Mr. Rodney J. Ryan, Jr., GARY, FIELD, LANDRY & DORNIER, 5th Floor, 8555 United Plaza Boulevard, Baton Rouge, Louisiana 70809; Mr. James D. McMichael, LISKOW & LEWIS, One Shell Square, Fiftieth Floor, New Orleans, Louisiana 70139-5001, and Mr. Paul J. Landry, 11862 Sheraton Drive, Baton Rouge, Louisiana 70815, this the 14th day of June, 1989.

Thomas H. Benton
Attorney

CERTIFICATE OF SERVICE

I, Thomas Harrison Benton, a member of the Bar of this Court, hereby certify that on the 20th day of July, 1990, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Mr. James D. McMichael, Esq., Liskow & Lewis, One Shell Square, 50th Floor, New Orleans, Louisiana 70139-5001, counsel for the respondent herein. I further certify that all parties required to be served have been served.



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